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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Amendment of the Commission's Rules) WT Docket No. 96-6
To Permit Flexible Service Offerings)
in the Commercial Mobile Radio Services)
)
To: The Commission)

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COMMENTS OF WESTERN WIRELESS CORPORATION

Western Wireless Corporation ("Western Wireless") hereby submits its comments on the Commission's *Notice of Proposed Rule Making*, WT Docket No. 96-6, FCC 96-17, released January 25, 1996.¹ Western Wireless supports the Commission's proposal for a flexible regulatory scheme whereby Commercial Mobile Radio Service ("CMRS") licensees may offer a broad range of fixed wireless local loop services over their authorized CMRS spectrum. CMRS licensees offering these fixed services should be regulated as all other CMRS providers and should not be subject to state entry and rate regulation.

BACKGROUND

Western Wireless, through its subsidiaries, holds numerous licenses to provide non-wireline cellular radiotelephone service ("cellular"), personal communications service ("PCS"), specialized mobile radio ("SMR") service, and paging and radiotelephone service ("paging") over a large portion of the western United States, including many rural areas. Western Wireless's cellular systems provide service to thousands of consumers in rural America located in California, Colorado, Idaho, Iowa, Kansas, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North

¹ *Amendment of the Commission's Rules To Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, WT Docket No. 96-6, *Notice of Proposed Rule Making*, FCC 96-17 (released January 25, 1996) ("NPRM").

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Dakota, South Dakota, Texas, and Wyoming. Additionally, to complement its cellular presence in the western United States, Western Wireless will soon provide PCS in the following major trading areas (“MTAs”): Des-Moines-Quad Cities, El Paso-Albuquerque, Honolulu, Oklahoma City, Portland, and Salt Lake City. As a CMRS operator providing cellular, PCS, and SMR wireless services to consumers in many rural areas, Western Wireless is well-situated to provide fixed wireless service, including wireless local loop service, to consumers that otherwise would not be able to obtain wireline local loop service.

Clearly, the public interest would be served by explicitly allowing CMRS licensees, such as Western Wireless, to offer a broad range of fixed wireless services to complement their mobile service offerings, services that are already implicitly allowed as “auxiliary,” “incidental,” and “ancillary” services. The public interest would not be served, however, by limiting the types of fixed wireless services offered by a CMRS licensee or subjecting CMRS licensees offering fixed wireless services to State entry and rate regulation. Further, by opening the doors for CMRS licensees to provide services that fall within the definition of universal service, the Commission will further its goal to “increase competition within wireless services and promote competition between wireless and wireline services.”²

I. THE NATURE AND TYPE OF FIXED WIRELESS SERVICES OFFERED BY CMRS LICENSEES SHOULD BE DETERMINED BY THE MARKETPLACE

Western Wireless fully supports the Commission’s proposal to amend its rules to explicitly allow CMRS licensees to provide wireless local loop services over their authorized spectrum. The Commission’s proposal will foster the development of competition in the local services market, enable consumers to receive the benefits of a competitive local services market, and promote

² *Id.* at para. 1.

efficient use of the spectrum. It is therefore important that the nature and type of wireless services offered by CMRS carriers be determined by consumer demand, not regulatory prerogatives.³

The Commission proposes to define “wireless local loop” as “the path between the subscriber and the first point of switching or aggregation of traffic.”⁴ The Commission proposed this broad definition specifically to make it unnecessary to examine the mobile or fixed nature of each application. Given the pace of technological developments and evolving consumer demands for communication services, the Commission should not attempt to circumscribe the nature or type of fixed services offered by CMRS providers, as long as the service falls within the definition of wireless local loop service. Rather, the Commission should explicitly allow CMRS licensees to offer all forms of mobile and fixed services, consistent with a CMRS licensee’s common carrier obligation to indiscriminately provide mobile services to consumers.

Currently, CMRS licensees are essentially able to provide fixed wireless services to consumers only if such services can be categorized as “auxiliary,” “incidental” or “ancillary” services. It is unclear, however, what type of services fall within the confines of these services because none of these terms are defined. This lack of clarity in the Commission’s rules has severely limited the ability of a CMRS licensee to provide non-conventional wireless applications, such as fixed local loop services. By clarifying its rules to explicitly allow CMRS licensees to provide a

³ The Commission regards Basic Exchange Telephone Radio Service (“BETRS”) as being “solely fixed in nature” and has previously excluded such services from the definition of mobile service. As the instant proceeding pertains to the flexible use of a CMRS provider’s spectrum, these comments address the use of BETRS as an auxiliary service on a cellular licensee’s frequencies as previously authorized by the Commission in *Amendment of Parts 2 and 22 of the Commission’s Rules to Permit Liberalization of Technology and Auxiliary Service Offerings*, GN Docket No., 87-390, *Report and Order*, 3 F.C.C.R. 7033 (1988).

⁴ *NPRM*, FCC 96-17 at para. 6.

broad range of fixed wireless services, the Commission will remove a major impediment to the development of competition between local wireless and wireline service providers.

Western Wireless supports the Commission's proposal to permit CMRS licensees to provide new and innovative fixed wireless local loop services, without limitation, provided that they meet their primary common carrier obligation to indiscriminately serve the mobile communications needs of the public pursuant to Section 332(c)(1) and (d) of the Communications Act.

II. FIXED WIRELESS LOCAL LOOP SERVICES OFFERED AS AN INTEGRAL PART OF A CMRS LICENSEE'S MOBILE SERVICE OFFERINGS SHOULD NOT BE SUBJECT TO STATE REGULATION.

Clarification of the rules, alone, will not result in increased competition in the local market. If CMRS licensees that provide fixed wireless local loop services are subject to State entry and rate regulation for these services, they will have a disincentive to provide fixed wireless services and, therefore, the Commission's goal of increased competition in the local market will not be met. Requiring CMRS providers to be subject to state entry and rate regulation contradicts the system of regulatory parity established by Congress in the Omnibus Budget Reconciliation Act of 1993⁵ and implemented by the Commission.⁶

If the Commission holds that fixed wireless local loop services offered by a CMRS licensee constitute part of the CMRS service offering, as Western Wireless suggests, State entry and rate regulation has already been preempted by Section 332 (c)(3) of the Act as added by the Omnibus

⁵ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b), 107 stat. 312, 392 (1993) ("Omnibus Act").

⁶ *Implementation of Section 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, *Second Report & Order*, 9 F.C.C.R. 1411, 1417 (1994), *Erratum*, 9 F.C.C.R. 2156 (1994) ("*Second Report & Order*").

Act.⁷ Moreover, if the Commission decides that fixed wireless local loop services are not subject to Section 332(c)(3), it should make clear that restrictive State regulation of such services is impermissible under Section 253 of the Act, as added by the Telecommunications Act of 1996,⁸ which prohibits State regulations that prohibit or have the effect of prohibiting new competitive telecommunications services.

The critical question in any preemption analysis is whether Congress intended that federal regulation supersede state law.⁹ Preemption occurs, *inter alia*, where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.¹⁰ Congress' intent in the Omnibus Act was to preempt State rate regulation of CMRS and all services provided on the CMRS spectrum.

In the Omnibus Act, Congress called for consistent regulatory treatment of all mobile service providers and gave the Commission the flexibility to establish the appropriate levels of regulation for mobile radio service providers. Congress further provided for the preemption of state regulation of entry and rates for CMRS providers and acknowledged that traditional state regulation

⁷ 47 U.S.C. § 332(c)(3); *see also* *Petition of Arizona Corporation Commission to Extend State Authority Over Rate Entry Regulation of All CMRS, Report and Order and Order on Reconsideration*, 10 F.C.C.R. 7824 (1995); *Petition on Behalf of the Louisiana Public Service Commission for Authority to Retain Existing Jurisdiction Over CMRS Offered Within the State of Louisiana, Report and Order*, 10 F.C.C.R. 7898 (1995); *Petition on Behalf of the State of Hawaii, Public Utility Commission for Authority to Extend its Rate Regulation of CMRS in the State of Hawaii, Report and Order*, 10 F.C.C.R. 7872 (1995).

⁸ 47 U.S.C. § 253, as enacted in Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (Feb. 8, 1996).

⁹ *See Louisiana Pub. Serv. Comm'n vs. FCC*, 476 U.S. 355, 369 (1986) ("*Louisiana PSC*").

¹⁰ *Id.*

may not always be necessary to promote competition or protect consumers in the mobile communications marketplace.¹¹

To emphasize its intent to preempt state entry and rate regulation for CMRS providers, Congress established specific conditions a state must meet when petitioning the Commission for authority to regulate rates for any commercial mobile service. Specifically, the state must demonstrate that:

- (i) market conditions with respect to such services fail to protect subscriptions adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or
- (ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such state.¹²

By adopting this provision, Congress reflected its intent to preempt state and local rate and entry regulation of all CMRS providers to ensure that similar services are afforded similar regulatory treatment and to avoid undue regulatory burdens.¹³ The legislative history of the Omnibus Act further points out:

If, however, several companies offer radio service as a means of providing basic service in competition with each other such that consumers can choose among alternative providers of this service, it is not the intention of the conferees that states should be permitted to regulate these competitive services simply because they employ radio as a transmission means.¹⁴

Thus, Congress clearly intended that CMRS providers should not be subject to State regulation

¹¹ *Second Report & Order*, at 1418.

¹² 47 U.S.C. 332(c)(3)(A)

¹³ *Second Report & Order*, at 1504.

¹⁴ H.R. Rep. 103-213, 103rd Cong., 1st Sess. 493 (1993).

“simply because they employ radio as a transmission means” when they provide a competitive alternative to wireline local loop service in response to market conditions by means of their authorized CMRS spectrum.¹⁵ Accordingly, such regulation is clearly preempted.

The Commission’s current rules permit PCS licensees to provide any fixed service that is ancillary to their mobile operations; SMR licensees may use licensed spectrum for certain fixed uses on a secondary, non-interference basis; and cellular carriers may provide auxiliary common carrier services, alternative cellular technologies, or fixed services as incidental communication services. At no point during the various Commission proceedings to license these services did the Commission state that the auxiliary, ancillary fixed services were subject to State regulation. In fact, in its proceeding to implement the mandates of the Omnibus Act, the Commission specifically determined that all auxiliary services provided by mobile services licenses should be included within the definition of mobile services as well as all ancillary fixed communications offered by PCS providers.¹⁶ The Commission found that “giving this scope to the definition of mobile service will

¹⁵ Western Wireless notes that the standards established by Congress in the Omnibus Act for State preemption by the Commission are not similar to the standard enunciated by the Supreme Court in *Louisiana PSC*. In *Louisiana PSC*, the Court held that, given the express reservation of state regulatory jurisdiction in 47 U.S.C. § 152(b) and the absence of a Congressional decision to preempt state regulation, the Commission may preempt state regulation of intrastate common carriage only when it is not possible to separate the interstate and intrastate components of the regulation. *Louisiana PCS*, 476 U.S. at 375 n.4. Federal courts construing this “inseparability doctrine,” however, have held that where interstate services are jurisdictionally “mixed” with intrastate services and facilities otherwise regulated by the states, state regulation of the intrastate service that affects interstate service may be preempted where the state regulation thwarts or impedes a valid Federal Policy. See, *Second Report & Order*, 9 F.C.C.R. at 1506 n.515; see also, *NARUC v. FCC*, 880 F.2d 422 (D.C. Cir. 1989); *Illinois Bell Tel. v. FCC*, 883 F.2d 104 (D.C. Cir. 1989); *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990).

¹⁶ *Id.* at 1424. As noted by the Commission, the PCS ancillary fixed use language was not intended to exclude fixed services, but to preserve the anticipated mobile operations attributable to PCS technologies. See *Flex NPRM*, FCC 96-17, at para. 12.

ensure that mobile services providers will have the flexibility necessary to meet growing consumer demand for a broad range of mobile services.”

By this proceeding, the Commission is, in effect, simply reaffirming the ability of CMRS carriers to provide fixed services over their authorized spectrum. The Commission has not, in the past, drawn distinctions between the type of services provided. As long as the service meets the definition of wireless local loop, the Commission should not step back from this position. There is no need to examine the nature of each service in order to assess whether the state should regulate the service provided by the CMRS operator or to carve out specific types of fixed services from the definition of mobile services simply because the service can be provided on a fixed basis.

State entry and rate regulation of CMRS licensees offering fixed services would contravene the express provisions of the Omnibus Act preempting such state regulation. Under narrowly defined circumstances, as set forth in Section 332 (c)(1), states may request authority to regulate a CMRS operator providing fixed services by petitioning the Commission for such authority. In the absence of a petition making the detailed showing required by the statute, state entry and rate regulation is preempted.

Finally, Western Wireless submits that States authority to regulate fixed wireless local loop service is further limited by new Section 253 of the Act. That section makes clear that, for services not subject to Section 332(c)(3), “[n]o State or local statute or regulation or other State or local legal requirement may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”¹⁷ Accordingly, if the Commission were to find that the preemption of state rate and entry regulation in Section 332(c)(3) does not extend to fixed

¹⁷ 47 U.S.C. § 253(a).

wireless local loop services, the Commission should make clear that state entry and rate regulation would violate Section 253(a) by having the effect of prohibiting the provision of such service. Any such regulation would be subject to preemption pursuant to Section 253(d).¹⁸

Accordingly, Western Wireless supports the Commission's proposal to treat fixed wireless local loop services as an "integral part of the CMRS services offered by a CMRS provider . . ."¹⁹ and urges the Commission to permit CMRS licensees to offer a broad range of fixed wireless local loop services using excess capacity without being subject to state regulation.

III. THE GOALS OF UNIVERSAL TELEPHONE SERVICE WILL BE FURTHERED BY ESTABLISHING COMPETITIVELY-NEUTRAL RULES GOVERNING THE ADMINISTRATION AND FUNDING OF UNIVERSAL SERVICE.

Western Wireless agrees with the Commission that the issue of imposing universal service obligations upon CMRS providers should be addressed in the pending universal service proceedings, not this proceeding. Western Wireless stresses, however, that the Commission needs to be mindful of the inherent differences between land line local exchange service providers and wireless local service providers in its efforts to create an equitable, competitively neutral, and nondiscriminatory universal service program. Universal service rules that do not on their face discriminate, but have the effect of discriminating, against wireless local service providers would not further the Commission's goal of universal telephone service. Western Wireless therefore urges the Commission to be guided by the following principles for the administration and funding of universal service:

- 1) the definition of "universal service" should be broad enough to include local services typically provided by wireless local service providers and not

¹⁸ 47 U.S.C. § 253(d).

¹⁹ *NPRM*, FCC 96-17, at para. 20.

include specific functions and features provided only by local exchange carriers;

- 2) the definition of "provider of last resort" and "eligible telecommunications carrier," as provided for in the Telecommunications Act of 1996, should not exclude wireless local service providers;
- 3) all common carriers capable of providing "universal service," including wireless common carriers, should be eligible for high cost support;
- 4) as a condition for eligibility to receive high cost support, wireless common carriers should not be required to obtain certification as local exchange service providers from State Commissions; and
- 5) any universal service assessment imposed on wireless common carriers must be non-discriminatory.

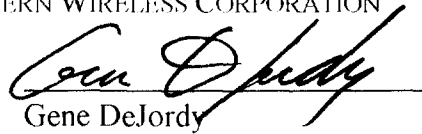
CONCLUSION

For the foregoing reasons, Western Wireless Corporation respectfully urges the Commission to allow CMRS licensees to offer a broad range of fixed wireless local loop services, including services that fall within the definition of universal service, over excess capacity without being subject to state regulation.

Respectfully submitted,

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